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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Amendment to the Commission's Rules )  
Regarding a Plan for Sharing ) WT Docket No. 95-157  
the Costs of Microwave Relocation ) RM 8643

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**REPLY**

Omnipoint Communications, Inc. ("Omnipoint"), by its attorneys and pursuant to Section 1.429 of the Commission's rules, hereby replies to several comments and oppositions filed concerning Omnipoint's July 12, 1996 Petition for Reconsideration and Clarification ("Petition") of the Commission's First Report and Order, FCC 96-196 (the "R&O"). No commenter significantly rebutted Omnipoint's positions in its Petition, and some parties supported those positions.

**Discussion**

In its Petition, Omnipoint requested that the Commission find that: (1) Omnipoint, as a small business operating with a Block A license, should be treated like other small businesses under the microwave relocation cost-allocation scheme;<sup>1</sup> (2) microwave incumbents seeking cash windfalls during the mandatory negotiation period are deemed not to be negotiating in good faith; and (3) the costs of relocating microwave links that are not within the licensed PCS band should be deemed "premiums" to the incumbent, and should not be considered costs of removing an interfering link.

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<sup>1</sup> Alternatively, Omnipoint offered that it should be entitled to repayment on the same conditions as its five-year pioneer's payment plan, adopted in "In the Matter of American Personal Communications, et al.," Order, 2 C.R. 798 (1996), *recon. pending*.

*A. Omnipoint is a "Small Business" and Should Be Treated As Such Under the Cost-Sharing Plan*

Significantly, no commenting parties objected to Omnipoint's first proposal. Through its subsidiaries, Omnipoint won 18 licenses in the Block C auction as a "small business." 47 C.F.R. §§ 24.709, 24.720. The Commission recognized Omnipoint's status as a "small business" by its acceptance of Omnipoint's short-form application to participate in the Block C auction and, more recently, the Block F auction. Moreover, the Commission accepted Omnipoint's Block C long-form applications and no party filed petitions to deny those applications. As a legitimate small business operating a Block A license, Omnipoint deserves the same installment payment provisions the Commission afforded to other small businesses in the R&O. The fact that Omnipoint is a small business operating an MTA license only heightens the need for equitable treatment. Omnipoint raised this issue in its initial comments and reply comments preceding the R&O and the Commission failed to address it. No party, either then or now, has expressed any objection to recognizing Omnipoint as a "small business" for purposes of participating in cost-sharing for the New York MTA. Given these facts, the Commission should expeditiously clarify that Omnipoint is entitled to such treatment.

*B. Demands for Cash Windfall Payment During the Involuntary Relocation Period Should Be Deemed Per Se Bad Faith Requests*

While AT&T Wireless<sup>2</sup> and PCIA<sup>3</sup> support Omnipoint's second position, microwave incumbents generally do not. UTC, for example, calls Omnipoint's proposal "rigid," alleging that a rule against cash windfalls would complicate the mandatory negotiation process. Opposition of UTC at 2-4; see also Opposition of APCO at 3. API raises a similar concern, asserting that the

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<sup>2</sup> AT&T Wireless Opposition at 2.

<sup>3</sup> Comments of PCIA at 8-9.

R&O implicitly sanctioned cash windfalls: "nowhere do [the relocation rules] indicate that it would be improper or an act of bad faith to seek other types of premiums, including premiums that are not directly tied to relocation costs." Opposition of American Petroleum Institute at 12. AAR is not quite so bold, and asserts that "its member railroads have not and would not demand excessive 'premiums' from PCS licensees as a precondition to moving their spectrum." Opposition of American Association of Railroads at 11. AAR opposes Omnipoint's proposal, however, because it claims that negotiations involving cash windfalls (presumably not with its members) should be dealt with "on a case by case basis." Id. AAR and other microwave incumbents favor a more lengthy "case-by-case" complaint process at the FCC in order to sort out whether or not the demand for an excessive cash windfall was "bad faith."

Many of the concerns raised by microwave incumbents evince an apparent misunderstanding of Omnipoint's actual proposal. Therefore, we will reiterate it here. A demand for a cash payment, which is not directly related to *any* costs of relocation *or* reasonable negotiating costs is not a legitimate "premium," but should be deemed an act of "bad faith" in the mandatory negotiation period. Petition at 5. This proposal is a logical outgrowth of the Commission's own explanation of permissible "premiums" (at ¶ 21 of the R&O), where it explains that the good-faith nature of demands for premiums depend on "the type of premium requested (e.g., whether the premium is *directly related to relocation . . .*)" In the context of voluntary negotiations, the R&O also contemplates that permissible premiums must be related to the replacement facilities or the negotiation process leading to the relocation. "[P]remiums could include: replacing the analog facilities with digital facilities, paying all of the incumbent's transactions costs, or relocating an entire system as opposed to just the interfering links." Id. at ¶ 15. Based on the text of the R&O, Omnipoint reasonably requests clarification that "[a] demand for a cash payment, which is not directly related to any costs of relocation or reasonable negotiating costs, appears to be well beyond what the Commission would perceive as a legitimate 'premium.'" Petition at 5.

Omnipoint disagrees with API's assertion that demands for cash payments "not directly tied to relocation costs" should be deemed valid. Eliminating the temptation of requests for excessive cash payments wholly unrelated to relocation can only expedite the negotiation process by keeping the parties focused on resolving the relocation issues (*e.g.*, technical issues, assurance of comparable facilities, seamless transition, etc.), and not profiteering.<sup>4</sup> Since cash payments unrelated to reimbursement for relocation costs are quite likely to be the *type* of premium that is impermissible, a ruling on that issue now (before the mandatory period begins) can save the Commission and all parties involved valuable time and litigation expenses.<sup>5</sup>

Finally, one cannot help but doubt the credibility of claims from microwave incumbents that Omnipoint's proposal would make the negotiation process too "rigid." These are the same parties, after all, that have forced upon the negotiation process a host of detailed federal requirements and exacting standards as to what constitutes comparable facilities, throughput, system reliability, operating costs, and trial periods. These parties are now before the Commission seeking even more rigid federal standards in these areas. By comparison, Omnipoint's request for a single standard limiting the demands for extraneous cash payments during the relocation process is modest.

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<sup>4</sup> UTC mischaracterizes Omnipoint's proposal as a request for transforming "the mandatory period into an extension of the involuntary period." Opposition of UTC at 3. Omnipoint has made no such proposal. Rather, Omnipoint urges that the Commission make clear that a demand for one type of premium -- cash payments that are unrelated to relocation costs -- is *per se* bad faith negotiation.

<sup>5</sup> UTC's claims that incumbents may be less willing to take cash in lieu of replacement facilities or to build out their own replacement is misplaced. UTC Opposition at 3. Omnipoint's proposal does not in any way speak to, or threaten to complicate, such arrangements.

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C. *PCS Operators Are Not Obligated to Relocate Non-PCS Links*

Omnipoint's Petition requested that the Commission clarify that PCS operators are not obligated to relocate microwave links outside the PCS band (e.g., links at 2.1 GHz). Instead, relocation of non-PCS band links should be deemed a "premium." Omnipoint believes that this is a fully supportable position, and one that is consistent with the Commission's existing rules and orders. See First Report and Order, ET Dkt. No. 92-9, 7 FCC Rcd. 6886, 6890 (1992) (FCC contemplates relocation process for microwave links in the 2 GHz emerging technology bands); Third Report and Order, 8 FCC Rcd. 6589, 6590-91 (1993) (FCC reallocation plan is for existing 2 GHz users); 47 C.F.R. § 101.75 (During the involuntary negotiation period, "ET licensees are obligated to pay to relocate only the specific microwave links to which their systems pose an interference problem").

In response, UTC challenged this request for clarification, arguing that the Commission should not adopt an "inflexible" rule on this issue because PCS operators may be required to relocate non-PCS band links in order to provide the incumbent with a "seamless transition." Opposition of UTC at 4-5.<sup>6</sup> In support, UTC quotes the R&O at ¶ 37, which states "if providing a seamless transition requires it, PCS licensees must relocate additional links or pay additional costs associated with integrating the new links into the old system."

Omnipoint believes that UTC has misconstrued the Commission's order. At ¶ 37, the Commission discussed the obligation of PCS licensees to relocate either on a per-link basis, as PCS site deployment interferes with incumbent links, or through a system-wide relocation. As the Commission explained the issue at ¶ 35 of the R&O, "while we encourage PCS licensees to relocate an entire microwave system at once -- including non-interfering links outside the PCS licensee's particular service area -- we do not regard this as a requirement under involuntary

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<sup>6</sup> AT&T Wireless supported Omnipoint's position. AT&T Wireless Opposition at 2.

negotiations." The discussion at ¶ 37 centers on whether a single PCS operator is obligated to move an entire 2 GHz microwave system that is within the PCS band when the PCS operator only interferes with one link of that system. The Commission decided that "PCS licensees are not under an obligation to move an incumbent's entire system at once, unless all of the links in the incumbent's system would be subject to interference by the PCS licensee." *Id.* at ¶ 37. At no time did the Commission suggest, as UTC does, that PCS operators are responsible for relocation of non-PCS band links. Rather, the phrase "additional links" in ¶ 37 referred to links that also lie within the 2 GHz PCS band, but which do not pose an interference issue for the PCS operator. In short, relocation of microwave links outside the 2 GHz PCS band are not the obligation of PCS licensees.


UTC's confusion on this issue amply demonstrates the need for the clarification that Omnipoint has requested.

### **Conclusion**

For the foregoing reasons and for the reasons stated in its Petition, Omnipoint requests that the Commission grant its Petition.

Respectfully submitted,

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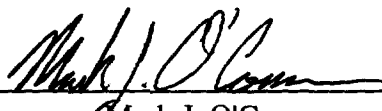
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